

Vet. App. No. 15-4463

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

CHET R. BENNETTS,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

BRIEF OF THE APPELLEE

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- 1) Whether the Court should affirm the October 27, 2015, decision of the Board of Veterans' Appeals (Board), which denied reopening of the claim for service connection for a sleep disorder, also claimed as sleep apnea.
- 2) Whether the Court should affirm the Board's denial of an increased rating in excess of 50 percent for post traumatic stress disorder (PTSD); post-concussional syndrome due to traumatic brain injury.
- 3) Whether the Court should affirm the Board's denial of an increased rating in excess of 20 percent for right lower extremity radiculopathy.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court of Appeals for Veterans Claims (Court) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252, which grants the Court exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant appeals an October 2015 Board decision that denied reopening of his claim for service connection for a sleep disorder, denied an increased rating in excess of 50 percent for PTSD and denied an increased rating in excess of 20 percent for right lower extremity radiculopathy. (RBA at 2-19).

C. Statement of the Facts

Appellant had active service from January 1999 to July 1999 and from June 2004 to April 2005. See RBA at 3. The Regional Office (RO) received Appellant's service medical records (SMRs) in June 2007 (RBA at 1137-357) and Appellant was granted service connection for PTSD in July 2007, effective March 2007. (RBA at 1085-92).

In December 2008 he filed a claim for *inter alia*, "sleep disorders." (RBA at 918-52). The RO obtained a VA medical examination in January 2009, wherein the examiner determined that Appellant's sleep problems were symptoms of his PTSD and not a separately diagnosable condition. (RBA at 860 (853-65)). In March 2009, the RO denied service connection for a sleep disorder because

Appellant did not have a separately diagnosable sleep disorder disability. (RBA at 831 (825-32) 811-12). The RO granted service connection for lumbar spine disc disease with right lower extremity radiculopathy, effective December 2008. *Id.* at 827-28. Appellant did not file a notice of disagreement (NOD) with this decision and it became final.

In May 2013 Appellant requested that VA “re-open” his claim for disability benefits for “sleep apnea or sleeping disorders”. (RBA at 611-12). He also requested an increased rating for his service-connected back condition, noting among other things that he had numbness and tingling down his right leg. *Id.*

Following VA psychiatric, spine and peripheral nerves examinations in October 2013 (RBA at 206-13, 214-27, 230-35 (206-35)), the RO, in January 2014, granted an increased rating of 10 percent for right lower extremity radiculopathy, effective May 17, 2013, continued a 50 percent rating for service-connected PTSD; post concessional syndrome, and denied reopening of the claim for service connection for sleep disorder. (RBA at 184-205). The RO deferred consideration of the claim for an increased rating for lumbar spine disc disease. *Id.* at 194.

Appellant perfected an appeal as to the rating assigned for the radiculopathy, the denial of an increased rating for PTSD and the denial of reopening of the claim for service connection for a sleep disorder. (RBA at 154-63, 89-119, 79-88).

In April 2014 the RO denied an increased rating for lumbar spine disc disease (RBA at 125-36), but Appellant did not file an NOD with this decision.

In October 2015, the Board denied reopening of the claim for service connection for a sleep disorder, denied an increased rating for PTSD and granted an increased rating of 20 percent for right lower extremity radiculopathy. (RBA at 2-19).

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's denial of reopening of his claim for service connection for a sleep disorder, now claimed as sleep apnea because the claim was properly adjudicated as claim to reopen and because his previous claim was denied because there was no diagnosed sleep disorder and none of the evidence submitted in the claim to reopen included a diagnosis of a sleep disorder to include sleep apnea.

The Court should affirm the Board's denials of increased ratings for PTSD and right lower extremity readiculopathy because Appellant fails to demonstrate any error in the Board's decision with regard to these claims and the Board's reasons and bases were adequate.

IV. LAW AND ARGUMENT

A) New and Material Evidence to Reopen the Previously Denied Claim for Service Connection for a Sleep Disorder

The Secretary must reopen a previously and finally disallowed claim when "new and material evidence" is presented or secured. 38 U.S.C. §§ 5108,

7104(b), 7105(c); 38 C.F.R. § 3.156(a). To satisfy this requirement, evidence presented or secured “must be both new and material.” *Woehlaert v. Nicholson*, 21 Vet.App. 456 460 (2007); *Smith v. West*, 12 Vet.App. 312, 314 (1999); see also *Shade v. Shinseki*, 24 Vet.App. 110 (2010). “New evidence” is evidence “not previously submitted to agency decision makers . . . [that] is neither cumulative nor redundant.” 38 C.F.R. § 3.156(a); see *Woehlaert*, 21 Vet.App. at 461; see also *Smith*, 12 Vet.App. at 314 (holding, if evidence was not in the record at the time of the final disallowance of the claim and is not cumulative of other evidence in the record, it is new). New evidence is “material” if, “by itself, or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.” 38 C.F.R. § 3.156(a).

Board determinations as to whether new and material evidence has been presented are generally reviewed under the deferential “clearly erroneous” standard. 38 U.S.C. § 7261(a)(4); see *Woehlaert*, 21 Vet.App. at, 461; *Fortuck v. Principi*, 17 Vet.App. 173, 178 (2003). Under this standard, “the Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a ‘plausible basis’ in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations,” the Court cannot overturn them. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

Appellant argues that the Board failed to provide adequate reasons or bases because he now claimed sleep apnea and the Board did not discuss sleep apnea in its decision. (Appellant's Brief (App. Br.) at 8-9). He argues that this is a separate, unique medical disability never considered by the Secretary, thus the Board failed to explain why it discounted favorable evidence. Essentially, Appellant seems to be arguing that VA should not have considered Appellant's claim as a claim to reopen.

However, Appellant has been represented by his current counsel since March 2013. (RBA at 609). Indeed it was this counsel that submitted the NOD with the January 2014 decision that denied reopening the claim. (RBA at 184-205, 154-63). Despite receiving a rating decision and a Statement of the Case that addressed the claim as one for reopening, neither Appellant nor his counsel, argued below that the claim should not be adjudicated in this manner. See e.g. (RBA at 154-63, 79-88) (asserting only boilerplate, generic allegations). Consequently, the Court should decline to address these allegations of error raised for the first time on appeal. See *Halle v. Nicholson*, 20 Vet.App. 237, 238 (2006) (per curium) ("In appeals to the Board, claimants should allege specific errors of fact or law . . . and counsel are expected to present those arguments they deem material and relevant to their clients' cases."); *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015) ("absent extraordinary circumstances . . . we think it is appropriate for the Board and the Veterans Court to address only those

procedural arguments specifically raised by the veteran”); *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000); *Massie v. Shinseki*, 25 Vet.App. 123, 127-28 (2011) (“VA’s interest in having a fair and full opportunity to consider all theories relevant to Mr. Massie’s appeal . . . outweighs Mr. Massie’s interest in having his argument heard for the first time on appeal to this Court . . . [and] [i]nterests of judicial economy demand that a represented veteran present all theories and assignments of error to VA before appealing to this Court”); *see also Overton v. Nicholson*, 20 Vet.App. 427, 438-39 (2006) (“it is not unreasonable to conclude that an attorney is acting with the full authority and knowledge of his client”).

In any case, the Court should reject Appellant’s allegations of error. Appellant’s prior claim was for “sleep disorders”. (RBA at 918). The basis of the March 2009 denial was that Appellant did not have a separately diagnosed sleep disorder, but rather his sleep problems were simply a symptom of his PTSD, based on the January 2009 VA exam. (RBA at 831 (825-32)). The January 2009 VA examiner stated that Appellant’s sleep problems did not merit a separate sleep disorder diagnosis. (RBA at 860 (853-65)). He then concluded that Appellant did not exhibit a diagnosis of sleep disorder secondary to PTSD. *Id.* at 864). As Appellant himself concedes, essentially the basis of the March 2009 denial was the lack of a diagnosis of a sleep disorder. ((App. Br. at 3).

While in his claim to reopen he claimed “sleep apnea or sleeping disorders”, the only problems he reported were that he was “not able to fall asleep” and had “difficulty sleeping.” (RBA at 611 (611-12)). These are the same symptoms of record prior to the 1/09 rating decision. See e.g. 952 (932-952) (noting that Appellant had difficulty falling or staying asleep); (RBA at 928 (RBA at 928-930) (noting “sleep is variable”), 859, 860 (853-65) (2009 VA exam noting that treatment records reflected difficulty staying asleep and that with Ambien he could sometimes fall asleep and stay asleep). Moreover, Appellant did not report that he was diagnosed with sleep apnea nor does he point to *any* diagnosis of or treatment for sleep apnea in the record in his brief. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error in a Board decision); *Leonard v. Principi*, 17 Vet.App. 447, 452-53 (2004) (holding that an appellant must support arguments with reasons and citations to supporting evidence and authority).

Appellant’s prior claim was essentially service connection for a sleep disorder manifested by difficulty falling and staying asleep and this is his current claim as well. The problem is and has been all along that there is no medical evidence of *any* diagnosable sleep disorder. Indeed, the January 2009 VA examiner specifically found that Appellant’s sleep problems did not merit a separate sleep disorder diagnosis. (RBA at 860 (853-65). While Appellant may seek to assign himself a diagnosis of sleep apnea for his difficulties falling and

staying asleep that does not change the nature of his claim or make it a new claim. Cases that have found a new claim where VA treated the claim as a claim to reopen or found distinct claims actually had evidence of a new or different *diagnosed* condition submitted after the previously denied claim, *see e.g. Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008); *Ephraim v. Brown*, 82 F.3d 399 (Fed. Cir. 1996). In this case there has *never* been evidence of a diagnosed sleep disorder disability; the basis of the previous denial was no diagnosed condition; and *none* of the new evidence contains a diagnosis of sleep apnea or any other sleep disorder. Consequently, VA and the Board properly treated the claim as a claim to reopen.

Appellant also argues that the Board's reasons or bases are inadequate because the Board did not address the references in the service medical records (SMRs) of some sleep problems. (RBA at 166-68) (App. Br. at 9-10). However, the Board did not need to address this evidence as these SMRs were of record at the time of the previous denial and the copies cited by Appellant are merely duplicates of previously considered records. *Compare* RBA at 1201, 1203, 1239 (1137-357)(SMRs received June 2007) with (RBA 166-68 (SMRs cited by Appellant)); *see also* (RBA at 826 (825-32) (March 2009 rating decision listing SMRs dated December 18, 1998, through April 2005 as part of the evidence considered)). *See* 38 C.F.R. § 3.156(a) ("new evidence means existing evidence not previously submitted to agency decisionmakers." And "New and material

evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim”). Furthermore, Appellant’s argument is really an argument as to the merits of a claim for service, but as the claim was not reopened, the Board did not reach the merits and there is no error in this regard.

B) Increased Rating Claims

“The Board’s finding as to the degree of impairment resulting from a disability are factual and are reviewed by the Court under the ‘clearly erroneous’ standard under 38 U.S.C. § 7261(a)(4). *Brambley v. Principi*, 17 Vet.App. 20, 22-23 (2003); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Under the “clearly erroneous” standard of review, “if there is a ‘plausible’ basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them.” *Gilbert*, 1 Vet.App. at 53; *see also Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997).

1) PTSD Rating

Appellant argues that the October 2013 examiner (and the Board) ignored Appellant’s multiple, separate diagnoses for an Axis-1 major depressive disorder. He argues that the examiner should have addressed whether the depressive disorder was caused or aggravated by the PTSD and cognitive disorder or otherwise underestimated the severity of his psychiatric condition. (App. Br. at 12, 13). Initially, with regard to the allegation of inadequate examination,

although represented by his current counsel since March 2013 (RBA at 609) and having access to Appellant's VBMS efolder (RBA at 152 (March 2014 RO Freedom of Information Act response), Appellant did not raise this allegation of error in the examination. In fact he raised *no* specific allegation of error in the examination, but submitted nothing more than generic boilerplate regarding VA's responsibility to provide an adequate examination. (RBA at 155-57 (154-63), 83-84 (79-88)). Consequently, the Court should decline to address these allegations of error as Appellant was represented by an attorney below and such allegations of error were not raised below. See *Halle*, 20 Vet.App. at 238 ("In appeals to the Board, claimants should allege specific errors of fact or law . . . and counsel are expected to present those arguments they deem material and relevant to their clients' cases."); *Scott*, 789 F.3d 1375 ("absent extraordinary circumstances . . . we think it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran"); *Maggitt*, 202 at 1377-78 ; *Massie*, 25 Vet.App. at 127-28 ("VA's interest in having a fair and full opportunity to consider all theories relevant to Mr. Massie's appeal . . . outweighs Mr. Massie's interest in having his argument heard for the first time on appeal to this Court . . . [and] [i]nterests of judicial economy demand that a represented veteran present all theories and assignments of error to VA before appealing to this Court"); see also *Overton*, 20 Vet.App. at 438-39 ("it is not

unreasonable to conclude that an attorney is acting with the full authority and knowledge of his client”).

In any case, Appellant is not service-connected for a depressive disorder. (RBA at 203-05 (184-205)). Nor does Appellant point to anywhere in the record where he claimed service connection for a depressive disorder. *MacPhee v. Nicholson*, 459 F.3d 1323 Fed.Cir. (2006); *Brokowski v. Shinseki*, 23 Vet.App. 79, 84-85 (2009). Consequently, neither the examiner, nor the Board were required to address whether a depressive disorder was caused or aggravated by the service-connected PTSD or consider its symptomatology in rating the service-connected PTSD. See 38 C.F.R. § 4.14 (“the use of manifestations not resulting from service-connected disease or injury in establishing the service-connected evaluation . . . are to be avoided.”). Furthermore, as Appellant himself notes, the examiner (and the Board (RBA at 12)) took into consideration Appellant’s depressed mood. (RBA at 212 (206-35). (App. Br. at 12). Finally, even assuming *arguendo* that the examiner or the Board should have addressed the separate diagnoses of major depression, Appellant does not point to any symptomatology that was not addressed by the examiner or the Board. See *Hilkert*, 12 Vet.App. at 151 (holding that the appellant has the burden of demonstrating error in a Board decision); *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704 (2009) (holding that an appellant bears burden of demonstrating prejudice on appeal).

2) Right lower Extremity Radiculopathy Rating

In March 2009, the RO granted service connection for lumbar spine disc disease with right lower extremity radiculopathy with a 20 percent rating, effective December 2008. (RBA at 825-32). Appellant did not file an NOD with this decision and it became final. In May 2013 he filed a claim for increased rating. (RBA at 611-12). In January 2014, the RO granted a separate 10 percent rating for right lower extremity radiculopathy, effective May 2013. (RBA at 193, 197-98 (184-205)). The RO also advised that the increased evaluation for lumbar spine disc disease was deferred. *Id.* at 194, 200. A copy of this decision was also provided to Appellant's counsel (RBA at 184-89) and Appellant, through his attorney filed an NOD with the assigned rating in March 2014. (RBA at 155 (154-63)). In April 2014, the RO denied an increased rating for the lumbar spine disc disease. (RBA at 125-36). Appellant's counsel was also provided with a copy of this decision. *Id.* at 125-30. Appellant did not file an NOD with this decision. Furthermore, Appellant's attorney asked the Board to clarify what claims had been certified to the Board (RBA at 62) and the Board advised as to what issues had been certified in August 2014 and they did not include an increased rating for the lumbar spine disc disease. (RBA at 35).

Appellant argues that the Board erred because although it granted a 20 percent rating for radiculopathy, the Board did not assign an effective date. (App. Br. at 15-16). However, Appellant does not explain how there is any error in this

regard or how he has been prejudiced and thus the Court should reject this argument. See *Hilkert*, 12 Vet.App. at 151 (holding that the appellant has the burden of demonstrating error in a Board decision); *Leonard*, 17 Vet.App. at 452-53 (holding that an appellant must support arguments with reasons and citations to supporting evidence and authority); *Shinseki*, 129 S.Ct. at 1704 (holding that an appellant bears burden of demonstrating prejudice on appeal). Consequently, the Court should reject this allegation of error. In any case, in December 2015, the RO assigned an effective date of May 17, 2013, for the 20 percent rating. (Attachment). This is the same effective date assigned by the RO for the increased rating of 10 percent it granted in January 2014, which Appellant, who was represented by his current counsel, did not disagree with. (RBA at 193 (184-205). A copy of the December 2015 rating was provided to Appellant's counsel. (Attachment). Appellant is still free to file an NOD with this decision, if he disagrees with it. Consequently, there is no basis to conclude that the Board erred in this regard and even if the Court were to find that it did, there is no basis to conclude that Appellant was prejudiced. See *Mlechick v. Mansfield*, 503 F.3d 1340, 1346 (Fed. Cir. 2007) (stating that the Court must take due account of the rule of prejudicial error); *Edenfield v. Brown*, 8 Vet.App. 384, 390-91 (1995) (the proper course of action is for the Court to affirm nonprejudicial errors); cf *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) ("strict adherence does not dictate an unquestioning, blind adherence in the face of overwhelming evidence in support

of the result in a particular case. Such adherence would result in this Court's unnecessarily imposing additional burdens on the [Board and VA] with no benefit flowing to the veteran.").

Finally, Appellant asserts inadequate reason or base because the Board did not discuss evidence regarding flare-ups of the back disability as noted on the October 2013 spine exam. (RBA at 214-22). (App. Br. at 16-17). However, none of the cited evidence discusses the severity of the *radiculopathy*. Thus, the Board was not required to discuss it. *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) ("the Board is not required to discuss all of the evidence of record but rather it must discuss the relevant evidence"); *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001) ("The Court has consistently found that a discussion of all evidence is not required when, as in the present case, the Board has supported its decision with thorough reasons or bases regarding the relevant evidence, and further adjudication would not benefit the appellant").

Moreover, while, Appellant cites to the spine exam's findings regarding functional impairment due to pain and weakness and argues that the examiner stated that Appellant's *radiculopathy* was subject to flare-ups accompanied by additional functional impairment caused by increased pain (App. Br. at 16), the examiner actually did *not* report that Appellant's *radiculopathy* was subject to flare-ups accompanied by additional functional impairment. The discussion of

flare-ups and functional impairment was with regard to the impact on the functioning of the thoracolumbar spine, not the right leg. (RBA at 215-17, 221 (214-22)). Thus, the Board was not required to address this evidence in determining the proper rating for the right leg radiculopathy. *Robinson*, 21 Vet.App. at 552; *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001).

Finally, the Board was aware of (and addressed) Appellant's complaints of daily right leg symptoms which were noted on the back exam (RBA at 215, 14 (2-19)) as they were also noted on the peripheral nerves exam and furthermore, reports of daily leg pain, with a more comprehensive description of the right leg symptomatology, was reported in the 2013 peripheral nerves exam. (RBA at 231 230-35)). While, the back exam also noted normal muscle strength and reflexes and a decreased sensation in the right lower leg/ankle sensory exam and mild intermittent right lower extremity pain and numbness and described the radiculopathy as mild (RBA at 217-18, 219 (214-22)), this is exactly what the peripheral nerves exam reported, although the peripheral nerves exam also notes mild paresthesias and/or dysethesias. (RBA at 231-33 (230-35)).

The October 2013 peripheral nerves exam provide a comprehensive assessment of the severity and symptomatology of Appellant's radiculopathy and the October 2013 back examination provides no evidence with regard to any additional symptomatology of the radiculopathy that is not also available in the October 2013 peripheral nerves exam. *Compare* (RBA at 214-222, 230-35).

Indeed, Appellant does not cite to any symptomatology actually relevant to the severity of the radiculopathy that the Board did not address and there is no basis to conclude that the Board's reasons or bases are inadequate.

V. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the October 27, 2015, Board decision.

Respectfully submitted,

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ATTACHMENT



DEPARTMENT OF VETERANS AFFAIRS

January 26, 2016

CHET R BENNETTS
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In Reply Refer To: 334/211/TH
CSS [REDACTED]
BENNETTS, Chet R

Dear Mr. Bennetts:

The Board of Veterans Appeals (BVA) made a decision on your appeal, which we received on October 27, 2015.

This letter tells you about what we decided. It includes a copy of our rating decision that gives the evidence used and reasons for our decision. We have also included information about additional benefits, what to do if you disagree with our decision, and who to contact if you have questions or need assistance.

What We Decided

We determined that the following service connected condition has worsened, so we granted an increase in your assigned percentage:

Medical Description	Old Percent (%) Assigned	New Percent (%) Assigned	Effective Date
Right lower extremity radiculopathy	10%	20%	May 17, 2013

Your overall or combined rating is 90%. We do not add the individual percentages of each condition to determine your combined rating. We use a combined rating table that considers the effect from the most serious to the least serious conditions.

Your compensation payment will continue unchanged.



CSS [REDACTED]
Bennetts, Chet R

We have enclosed a copy of your Rating Decision for your review. It provides a detailed explanation of our decision, the evidence considered, and the reasons for our decision. Your Rating Decision and this letter constitute our decision based on the BVA decision received on October 27, 2015. It represents all claims we understood to be specifically made, implied, or inferred in that decision.

We enclosed a VA Form 21-8764, "Disability Compensation Award Attachment-Important Information," which explains certain factors concerning your benefits.

Are You Entitled to Additional Benefits?

If you served overseas in support of a combat operation you may be eligible for mental health counseling at no cost to you at the Veteran's Resource Center. For more information on this benefit please visit <http://www.myhealth.va.gov/mhv-portal-web/>.

You may be eligible for medical care by the VA health care system for any service connected disability. You may apply for medical care or treatment at the nearest medical facility. If you apply in person, present a copy of this letter to the Patient Registration/Eligibility Section. If you apply by writing a letter, include your VA file number and a copy of this letter.

REDUCE OR ELIMINATE YOUR MEDICAL CO-PAYMENTS

If you receive care at a VA medical facility, **please call our Health Benefits Call Center at 1-877-222-VETS (8387) or notify your local VA medical center** of this change in your compensation benefits. This rating decision may reduce or eliminate your co-payments for your VA-provided medical care. You may also be eligible for a refund based on this rating decision. Information regarding VA health care eligibility and co-payments is available at our website <http://www.va.gov/healthbenefits/cost/>.

CSS [REDACTED]
Bennetts, Chet R

You should contact your State office of Veteran's affairs for information on any tax, license, or fee-related benefits for which you may be eligible as a Veteran (or surviving dependent of a Veteran). State offices of Veteran's affairs are available at <http://www.va.gov/statedva.htm>.

The VA provides Blind Rehabilitation services to eligible blind, low vision, or visually impaired Veterans to help them regain their independence and quality of life. The Veteran's blindness, low vision, or vision impairment does NOT have to be related or caused by military service. If you need help with your vision loss, please contact your nearest Visual Impairment Services Team Coordinator (VIST) at the eye clinic at your nearest VA Medical Center. For more information, go to <http://www.rehab.va.gov/blindrehab/>.

Your combined evaluation is 30 percent or more disabling; therefore, you may be eligible for additional benefits based on dependency. If you wish to submit a claim for dependents, please complete and return the attached VA Form 21-686c, *Declaration of Status of Dependents*. Please fill out every blank on the form. We may be able to pay you retroactive benefits for your dependents if you submit the VA Form 21-686c, *Declaration of Status of Dependents* or report dependents within a year from the date of this letter.

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision regarding the effective date of your service connected right lower extremity radiculopathy, you must complete and return to us the enclosed VA Form 21-0958, *Notice of Disagreement*, in order to initiate your appeal. You have *one year from the date of this letter to appeal the decision*. The enclosed VA Form 4107, *Your Rights to Appeal Our Decision*, explains your right to appeal.

Any disagreement with the Board of Veterans Appeals (BVA) decision regarding the evaluation of your service connected right lower extremity radiculopathy must be made to the BVA or to the United States Court of Appeals for Veterans Claims within 120 days of the date of the BVA decision. We have enclosed a VA Form 4597, "Your Rights to Appeals Our Decision," which was originally enclosed with the BVA decision. For specific instructions regarding what to do if you are not satisfied with the BVA decision, you should refer to this VA Form 4597.

What Is eBenefits?

eBenefits provides electronic resources in a self-service environment to Servicemembers, Veterans, and their families. Use of these resources often helps us serve you faster! Through the eBenefits website you can:

CSS [REDACTED]
 Bennetts, Chet R

- Submit claims for benefits and/or upload documents directly to the VA
- Request to add or change your dependents
- Update your contact and direct deposit information and view payment history
- Request a Veterans Service Officer to represent you
- Track the status of your claim or appeal
- Obtain verification of your military service, civil service preference, or VA benefits
- And much more!

Enrolling in eBenefits is easy. Just visit www.eBenefits.va.gov for more information. If you submit a claim in the future, consider filing through eBenefits. Filing electronically, especially if you participate in our fully developed claim program, may result in faster decision than if you submit your claim through the mail.

If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov .
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached <i>Where to Send Your Written Correspondence</i> .

In all cases, be sure to refer to your VA file number [REDACTED].

If you are looking for general information about benefits and eligibility, you should visit our website at <https://www.va.gov>, or search the Frequently Asked Questions (FAQs) at <https://iris.va.gov>.

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Bennetts, Chet R

We sent a copy of this letter to your representative, John Berry, whom you can also contact if you have questions or need assistance.

Sincerely yours,

Regional Office Director
VA Regional Office

Enclosure(s): Rating Decision
VA Form 21-8764
VA Form 21-686c
VA Form 4107
VA Form 21-0958
VA Form 4597
Where to Send Your Written Correspondence

cc: John S. Berry
Attorney at Law



DEPARTMENT OF VETERANS AFFAIRS
Lincoln Regional Office
Lincoln, Nebraska

CHET BENNETTS

VA File Number



Represented By:
JOHN BERRY

Rating Decision
12/14/2015

INTRODUCTION

The records reflect that you are a veteran of the Gulf War Era. You served in the Marine Corps from June 1, 2004 to April 21, 2005. The Board of Veterans Appeals made their decision on your appeal on October 27, 2015. We have implemented their decision based on the evidence listed below.

DECISION

Evaluation of right lower extremity radiculopathy, which is currently 10 percent disabling, is increased to 20 percent effective May 17, 2013.

EVIDENCE

- Board of Veterans' Affairs decision dated October 27, 2015



REASONS FOR DECISION

Evaluation of right lower extremity radiculopathy currently evaluated as 10 percent disabling.

We have implemented the Board of Veterans' Appeals decision dated October 27, 2015, please refer to that decision for explanation of decision.

The evaluation of right lower extremity radiculopathy is increased to 20 percent disabling effective May 17, 2013.

We have assigned a 20 percent evaluation for your right lower extremity radiculopathy based on:

- Moderate incomplete paralysis

A higher evaluation of 40 percent is not warranted for paralysis of the sciatic nerve unless the evidence shows nerve damage is moderately severe.

We have assigned an effective date of May 17, 2013, date of receipt of your claim for an increased evaluation of your right lower extremity radiculopathy.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

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NAME OF VETERAN CHET BENNETTS	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA JOHN BERRY	COPY TO	

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
06/01/2004	04/21/2005	Marine Corps	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		1018

JURISDICTION: BVA Decision Dated 10/27/2015

ASSOCIATED CLAIM(s): 172; BVA Grant; 10/27/2015

SUBJECT TO COMPENSATION (1.SC)

9411	POSTTRAUMATIC STRESS DISORDER; POST-CONCUSSIONAL SYNDROME (COGNITIVE DISORDER NOT OTHERWISE SPECIFIED) DUE TO TRAUMATIC BRAIN INJURY [PTSD/Other/Unknown-PTSD] Service Connected, Gulf War, Incurred Static Disability 50% from 12/05/2008
8045	TRAUMATIC BRAIN INJURY WITH SUBJECTIVE COMPLAINTS OF DIZZINESS Service Connected, Gulf War, Incurred Static Disability 10% from 12/05/2008 40% from 05/17/2013
7346	HIATAL HERNIA, GASTROESOPHAGEAL REFLUX DISEASE Service Connected, Gulf War, Incurred Future Exam October 2018 30% from 03/26/2007
9411	POST TRAUMATIC STRESS DISORDER [PTSD/Medical/Veteran Evidence] Service Connected, Gulf War, Incurred 30% from 03/26/2007 to 12/05/2008
8100	HEADACHES Service Connected, Gulf War, Secondary Static Disability 0% from 12/05/2008 30% from 05/17/2013

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NAME OF VETERAN CHET BENNETTS	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA JOHN BERRY	COPY TO

5243 LUMBAR SPINE DISC DISEASE
Service Connected, Gulf War, Aggravated
Static Disability
20% from 12/05/2008

8520 RIGHT LOWER EXTREMITY RADICULOPATHY
Service Connected, Gulf War, Secondary
Static Disability
0% from 12/05/2008
20% from 05/17/2013

6260 TINNITUS
Service Connected, Gulf War, Incurred
10% from 03/26/2007

5299-5262 RIGHT ANKLE, STRAIN
Service Connected, Gulf War, Incurred
10% from 12/05/2008

6090-6080 CONVERGENCE INSUFFICIENCY WITH DIPLOPIA
Service Connected, Gulf War, Secondary
Static Disability
0% from 12/05/2008
10% from 05/17/2013

6100 HEARING LOSS OF THE RIGHT EAR
Service Connected, Gulf War, Incurred
0% from 03/26/2007

6599-6502 RECURRENT EPISTAXIS
Service Connected, Gulf War, Incurred
Static Disability
0% from 03/26/2007

9999-9905 BRUXISM AND OCCLUSAL WEAR ON MAXILLARY AND MANDIBULAR
TEETH AND TEMPOROMANDIBULAR JOINT DISORDER
Service Connected, Gulf War, Aggravated
Static Disability
0% from 08/31/2009

COMBINED EVALUATION FOR COMPENSATION :

60% from 03/26/2007
80% from 12/05/2008
90% from 05/17/2013

Rating Decision	<i>Department of Veterans Affairs Lincoln Regional Office</i>		Page 3 of 3 12/14/2015	
NAME OF VETERAN CHET BENNETTS	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA JOHN BERRY	COPY TO

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Gulf War)

5260 RIGHT KNEE CONDITION
Not Service Connected, Not Secondary
Original Date of Denial: 01/31/2014

5271 LEFT ANKLE CONDITION
Not Service Connected, Not Incurred/Caused by Service
Original Date of Denial: 03/16/2009

6100 HEARING LOSS OF THE LEFT EAR
Not Service Connected, Hearing Normal for VA Purposes
Original Date of Denial: 07/23/2007

9499-9410 SLEEP DISORDER
Not Service Connected, Not Secondary
Original Date of Denial: 03/16/2009

Appeals VSR: This is a BVA grant, evaluation for this condition was determined by BVA. Effective date assigned by RVSR.

I certify that I have reviewed and electronically signed this document, A. Talley, Appeals RVSR(334)